STATE OF MICHIGAN

COURT OF APPEALS

RANDALL HARTZELL, as Personal Representative of the Estate of ROBBIE EDWARD HARTZELL, Deceased,

Plaintiff-Appellee/Cross-Appellee,

v

CITY OF WARREN, OFFICER LOU GALASSO, ERNESTO, M.D., DEBRA CISCO, R.N., and CORRECTIONAL MEDICAL SERVICES, INC,

Defendants/Cross-Appellants,

and

MACOMB COUNTY,

Defendant-Appellant.

UNPUBLISHED
May 10, 2005

No. 252458
Macomb Circuit Court
LC No. 2001-003788-NM

Before: Talbot, P.J., and Jansen and Gage, JJ.

PER CURIAM.

Defendant-Appellant Macomb County appeals by leave granted from a trial court opinion and order granting in part and denying in part its motion for summary disposition from claims brought by plaintiff, Randall Hartzell as representative of the estate of Robbie Hartzell (hereinafter "decedent"). The trial court denied Macomb County's motion for summary disposition from plaintiff's 42 USC 1983 claim, which alleged deliberate indifference to decedent's serious medical needs. This Court denied Macomb County's application for leave to appeal, and on November 26, 2003, the Michigan Supreme Court, in lieu of granting leave, remanded the case to this Court to review as on leave granted. *Hartzell v City of Warren*, 469 Mich 967; 671 NW2d 884 (2003). Subsequently, defendants city of Warren, Officer Lou Galasso, Ernest Bedia M.D., Debra Cisco R.N., and Correctional Medical Facilities (hereinafter "CMS") filed claims of cross appeal from the trial court order denying their motions for summary disposition. We reverse and remand.

I

In June 1998, decedent had a brain aneurysm with an intracerebral hemorrhage, requiring surgery. Upon being discharged, decedent was instructed to take Catapres daily to control his hypertension. On July 25, 1998, decedent was arrested by the Warren Police Department for breaking and entering and was detained in the Warren jail. On July 27, 1999, decedent was transferred to the Macomb County Jail. While in the Macomb County Jail, decedent was examined and evaluated by Nurse Cisco, and she noted that decedent's blood pressure was 132/94, which Cisco indicated was well within normal and acceptable limits. Nurse Cisco, in her affidavit, indicated that she conducted a medical history and screening of decedent around 9:30 p.m., and that he generally seemed fine. In her affidavit, Cisco also indicated that decedent informed her that he had hypertension, a craniotomy approximately one month prior, that his current medication was .2 mg of Catapres twice per day, and that decedent reported that he had no medical problems which required immediate attention. Nurse Cisco placed decedent on sick call to see the jail physician on the following day. On July 28, 1998, at around 12:55 p.m., Dr. Bedia examined decedent at the Macomb County Jail, noted his blood pressure was 180/108, and after the examination prescribed decedent .2 mg Catapres once a day, Ecotrin, and directed that decedent's blood pressure be taken twice weekly. The medical records indicate that Dr. Bedia's orders were followed and the decedent was given the medication on July 28, 1998. But, this is disputed as Nurse Janie Kushniruk, whose initials are signed next to the documentation indicating that decedent received his medication, testified in her deposition that she did not give decedent his medication or give anyone permission to use her initials. At approximately, 3:15 p.m., on the same day, decedent was found unconscious with a blood pressure of 280/200, and was transferred to Mt. Clemens General Hospital. On July 30, 1998, decedent was pronounced dead.

Plaintiff filed a complaint, jury demand, and affidavits of merit alleging: (Count I) state and federal constitutional violations actionable under Michigan law and 42 USC 1983 against all defendants, claiming defendants denied decedent medication and adequate medical attention for a serious medical need, allowing and causing him to die; (Count II) Warren and Macomb County violated decedent's state and federal rights because they failed to implement and monitor an adequate screening and classification system for persons detained, failed to adequately train detention facility employees, adopted policies which denied decedent medical treatment with a deliberate indifference, and that all of the acts and omissions constituted deliberate indifference to decedent's serious and apparent medical needs; (Count III) a state law violation based on the gross negligence of Officer Galasso, CMS, Dr. Bedia, and Nurse Cisco for failure to provide decedent with appropriate medical care; and (Count IV) medical malpractice against Macomb County, CMS, Nurse Cisco, and Dr. Bedia as ordinary reasonable care and diligence was not used because decedent was treated in a negligent fashion and defendants' were the proximate cause of decedent's death.

Defendants filed motions for summary disposition, and, after a hearing on these motions, the trial court entered an opinion and order granting in part and denying in part defendants' motions for summary disposition. With regard to defendants CMS, Dr. Bedia, and Cisco, the trial court denied their motion, in its entirety, finding: (1) plaintiff's general allegations set forth sufficient facts to establish that decedent had a serious medical need, and, despite knowledge of this serious medical need, defendants Dr. Bedia and Nurse Cisco failed to administer medication, so questions of fact remain as to whether decedent received medication while incarcerated; (2) plaintiff's gross negligence claim was a viable claim along with the medical malpractice claim;

and (3) plaintiff complied with MCL 600.2912b(4), thus, the statue of limitations was tolled. With regard to Macomb County's motion for summary disposition, the trial court denied in part and granted in part its motion finding: (1) plaintiff's claim under the Michigan Constitution should be dismissed because an alternative remedy was available to plaintiff under 42 USC 1983; (2) plaintiff's state tort law claims should also be dismissed because Macomb County is immune; (3) plaintiff's vicarious liability medical malpractice claim must be dismissed because Macomb County is immune from this liability; and (4) summary disposition should be denied with regard to the 42 USC 1983 claims because the allegation raised issues of material fact with regard to whether the incident was more than isolated. With regard to the City of Warren and Officer Galasso, the trial court denied the motion for summary disposition finding that the Warren jail had a policy and procedure to be followed for medical needs, there was a question of fact as to whether there was gross negligence, and questions of fact remain with regard to whether administration of the drug would have saved decedent.

Macomb County filed a motion for reconsideration, which the trial court denied. The trial court acknowledged that it had overlooked the proper deliberate indifference standard, but found that Macomb County had not demonstrated a palpable error by which the court and the parties have been misled and failed to show that a different disposition would result with correction of any error. Subsequently, Macomb County filed an application for leave to appeal with this Court, which this Court denied. Then, Macomb County filed an application for leave to appeal to our Supreme Court, and on November 26, 2003, the Michigan Supreme Court, in lieu of granting leave, remanded the case to this Court to review as on leave granted. *Hartzell, supra*.

II

Defendants Macomb County, CMS, Dr. Bedia, and Nurse Cisco all contend, on appeal, that the trial court erred in denying their motions for summary disposition with regard to plaintiff's 42 USC 1983 claims. We agree.

A. Standard of Review

On appeal, a trial court's decision on a motion for summary disposition is reviewed de novo. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003). This Court must review the record in the same manner as must the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998), after remand 469 Mich 487; 672 NW2d 849 (2003); *Scalise v Boy Scouts of America*, 265 Mich App 1, 12; 692 NW2d 858 (2005). Review is limited to the evidence that had been presented to the trial court at the time the motion was decided. *Peña v Ingham County Road Comm*, 255 Mich App 299, 313 n 4; 660 NW2d 351 (2003).

Under MCR 2.116(C)(10), summary disposition is proper when "there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." When deciding a motion for summary disposition, a court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party. *Corley v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). A motion for summary disposition based on the lack of a material factual dispute must be supported by documentary evidence. MCR 2.116(G)(3)(b); *Scalise, supra*. The

moving party must specifically identify the matters that have no disputed factual issues, MCR 2.116(G)(4), *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and has the initial burden of supporting his position by affidavits, depositions, admissions, or other documentary evidence, *Smith v Globe Life Ins Co*, 460 Mich 446, 455; 597 NW2d 28 (1999). The party opposing the motion then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists that is material to the dispositive legal claims. *Id.; Glass v Goeckel*, 262 Mich App 29, 33; 683 NW2d 719 (2004). When the burden of proof at trial would rest on the nonmoving party, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth specific facts showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996); *Karbel v Comerica Bank*, 247 Mich App 90, 97; 635 NW2d 69 (2001).

B. 42 USC 1983 Claim

Section 1983 provides a federal remedy against any person who, under color of state law, deprives another of rights protected by the constitution or laws of the United States. *Payton v Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1996) citing *Monell v Dep't of Social Services of New York*, 436 US 658, 690-691; 98 S Ct 2018; 56 L Ed 2d 611 (1978). In *Estelle v Gamble*, 429 US 97, 98-101; 97 S Ct 285; 50 L Ed 2d 251 (1976), the Supreme Court, in determining whether a cause of action existed under 42 USC 1983, analyzed Eighth Amendment[1] prohibitions against "cruel and unusual punishments." *Id*. at 102-103. It determined that the government has an obligation to provide medical care for those whom it is punishing by incarceration. *Id*. at 103. The Court concluded that "deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment." *Id*. at 104, quoting *Gregg v Georgia*, 428 US 153, 173; 96 S Ct 2909; 49 L Ed 2d 859 (1976). The Court recognized, however, that a violation does not occur every time a prisoner claims that he received inadequate medical treatment. *Id*. It held that "an inadvertent failure to provide adequate medical care" is not actionable and that a "complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment." *Id*. at 105-106. Rather, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Id*. at 106.

In *Farmer v Brennan*, 511 US 825; 114 S Ct 1970; 128 L Ed 2d 811 (1994), the Court rejected an objective deliberate indifference test in favor of a higher standard requiring

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[1] We note that decedent was a pretrial detainee, and that pretrial detainees do not come within the Eighth Amendment, which protects convicted prisoners. *City of Revere v Massachusetts Gen Hosp*, 463 US 239, 244, 77 L Ed 2d 605, 103 S Ct 2979 (1983); *Graham v County of Washtenaw*, 358 F3d 377, 383 (6th Cir 2004). However, detainees are entitled under the Fourteenth Amendment's substantive due process clause to the same care as prison inmates. *Graham*, 358 F3d at 383 (Fourteenth Amendment "affords pretrial detainees a due process right to adequate medical treatment that is analogous to the Eighth Amendment rights of prisoners."). The same standard, deliberate indifference, applies to both detainees and convicts. See *id*.; *Watkins v City of Battle C*reek, 273 F3d 682, 686 (6th Cir 2001).

subjective knowledge or awareness in order to impose liability under the Eighth Amendment. *Farmer, supra* at 837, 840; see also *Johnson v Wayne Co*, 213 Mich App 143, 152; 540 NW2d 66 (1995). In other words, it is not enough for a plaintiff to show that a substantial risk of harm was "obvious" and that a reasonable prison official would have noticed it. *Farmer, supra* at 841-842. As a result, mere negligence, or even "gross negligence," simply does not amount to deliberate indifference for Eighth Amendment purposes. See *id*. at 835-836; see also *City of Canton v Harris*, 489 US 378, 389, n 7; 109 S Ct 1197; 103 L Ed 2d 412 (1989); *Jones v Wellham*, 104 F3d 620, 627 (CA 4, 1997); *Johnson, supra* at 162-163 (D.C. Kolenda, J., concurring). Also, medical malpractice is insufficient to establish deliberate indifference. See *Estelle, supra* at 106; *Tobias v Phelps*, 144 Mich App 272, 277; 375 NW2d 365 (1985).

The courts of this state have agreed that mere negligence does not establish deliberate indifference. *Jackson v Detroit*, 449 Mich 420, 431-432; 537 NW2d 151 (1995); *Davis v Wayne Co Sheriff*, 201 Mich App 572, 577; 507 NW2d 751 (1993). This Court in *Tobias, supra* at 277-278, further articulated what is needed for a serious medical need and deliberate indifference as follows:

> A medical need is serious if it is one that has been diagnosed by a physician as requiring treatment or it is so obvious that even a lay person would recognize the necessity of medical attention. To have acted with "deliberate indifference", defendants must have either intentionally denied or unreasonably delayed treatment of a discomfort-causing ailment or willfully failed to provide prescribed treatment without medical justification.
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> The trial court's analysis focused on whether the medical care Weatherspoon received was premised on an illegal standard of care and as such constituted cruel and unusual punishment. But the case before this Court is not based on an allegation of an Eighth Amendment violation. It is based on a claim of medical negligence. While deliberate indifference as a matter of policy is constitutionally intolerable in correctional facilities, Wise did not testify to any standard of care or policy that permitted deliberate indifference to inmates' medical conditions. She did not outline a standard of care that would enable nurses to intentionally deny, unreasonably delay, or willfully fail to provide treatment without medical justification.
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> In fact, Wise offered testimony that the standard of care in the prison setting is different from that in the outside world. The prison setting can be construed as the "community" within which defendants practiced. If the standard of care in the prison setting is as Wise testified, then defendants' conduct was properly measured against that standard of care. Whether that standard of care is illegal, as the trial court concluded, does not affect whether defendants were negligent in their treatment of Weatherspoon, i.e., violated that standard, and thus should not affect this medical malpractice action. [Citations and footnote omitted.]

A claim of deliberate indifference necessarily implies that the defendant knew or should have known that the action was "wrong" or "unconstitutional." *Dampier v Wayne Co*, 233 Mich App 714, 739; 592 NW2d 809 (1999). In *York v Detroit*, 438 Mich 744, 757; 475 NW2d 346 (1991),

the Court stated that "deliberate indifference contemplates knowledge, actual or constructive, and a conscious disregard of a known danger." *Id*.

"[U]nder some circumstances the denial of medical care to a prisoner may give rise to a violation of Fourteenth Amendment due process." *Westlake v Lucas*, 537 F2d 857, 859 (CA 6 1976). "Where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments and to constitutionalize claims which sound in state tort law." *Id*. at 860 n 5. "Medical treatment that is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness violates the eighth amendment." *Rogers v Evans*, 792 F2d 1052, 1058 (CA 11 1986).

1. Dr. Bedia and Nurse Cisco

Defendants Dr. Bedia and Nurse Cisco contend that plaintiff has failed to produce evidence from which, if true, a jury could conclude that they acted with deliberate indifference to decedent's alleged serious medical needs. We find on review de novo, that plaintiff has not raised a genuine issue of material fact with regard to whether the treatment decedent received from Dr. Bedia and Nurse Cisco was deliberately indifferent to his serious medical needs.

There is no documentary evidence to support that either defendant Dr. Bedia or Nurse Cisco consciously disregarded a known danger to decedent. See *York*, *supra* at 757. Defendants' brief in support of the motion for summary disposition contended that the actions of Dr. Bedia and Nurse Cisco were not deliberately indifferent to decedent's serious medical needs and documentary support was provided. Defendants presented documentation supporting that: (1) decedent received a medical assessment on July 7, 1998, by Nurse Cisco who observed decedent's blood pressure was 132/94 and had no complaints or serious medical needs, but she placed him on sick call because he had a craniotomy in June 1997, has hypertension, and takes Catapres; (2) decedent was examined by Dr. Bedia on July 28, 1998 at 12:55 p.m., at which time decedent's blood pressure was at 180/108, decedent had no medical complaints, but was prescribed Catapres, Ecotrin, and blood pressure monitoring; (3) the medical reports indicate that decedent was given the Catapres and Ecotrin on July 28, 2001; (4) at around 3:15 p.m. Dr. Bedia was informed decedent was having tremors with a blood pressure of 280/200 and EMS was immediately called and decedent was taken to the hospital; and (5) both Dr. Bedia and Nurse Cisco indicated that they followed the proper standard of care. Plaintiff's brief in response to defendants' motion for summary disposition claimed that a question of fact existed with regard to whether defendants Nurse Cisco and Dr. Bedia acted with deliberate indifference because: (1) decedent's blood pressure was elevated when he was examined by Nurse Cisco but no action was taken; (2) fifteen hours later when Dr. Bedia examined decedent his blood pressure was further elevated, and no action was taken, except he was prescribed Catapres and Ecotrin; (3) the record reflects that decedent was given Catapres, but Nurse Kushniruk denies that initials JK in the record were hers and defendants cannot identify who gave the medication, with the reasonable inference being that the records were altered to reflect that a dosage of Catapres was given when it was not; and (4) the rapid rise of blood pressure is consistent with a dangerous increase caused by discontinuation of Catapres.

Plaintiff has not raised a question of fact with regard to whether Dr. Bedia and Nurse Cisco showed deliberate indifference towards the serious medical needs of decedent. There is

no showing that Dr. Bedia, Nurse Cisco, or anyone else "either intentionally denied or unreasonably delayed treatment of a discomfort-causing ailment or willfully failed to provide prescribed treatment without medical justification." *Tobias, supra* at 278. Instead, the submitted documentary evidence supported that decedent was examined and provided care that was determined appropriate by Nurse Cisco and Dr. Bedia. Nurse Cisco examined defendant and scheduled him to see the doctor, and there is nothing to suggest anything more than negligence or medical malpractice on her part. Dr. Bedia examined decedent and made recommendations based on his judgment. Dr. Bedia prescribed decedent Catapres and Ecotrin and ordered that decedent have his blood pressure regularly checked. The records indicate that this medication was given to decedent. The only contention is that Nurse Cisco and Dr. Bedia did not appropriately treat a patient with hypertension history and who recently had a craniotomy. At best, plaintiff challenges the adequacy of the treatment decedent received, which is a medical malpractice claim, but does not state a claim of medical mistreatment. See *Estelle, supra* at 105-106; *Westlake, supra* at 860 n 5. The decisions of Dr. Bedia and Nurse Cisco in the present case support a claim that they may have been negligent in diagnosing or treating decedent's preexisting medical condition. But "an inadvertent failure to provide adequate medical care" is not actionable and a "*complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment* under the Eighth Amendment." *Estelle, supra* at 105-106 (emphasis added). "Medical treatment that is so grossly incompetent, inadequate, or excessive as to shock the conscience or to be intolerable to fundamental fairness violates the eighth amendment." *Rogers, supra* at 1058. Viewing the submitted evidence in the light most favorable to plaintiff, the treatment administered by Dr. Bedia and Nurse Cisco to decedent does not reach this level.

Even if decedent was not administered the Catapres there is no showing that any failure was intentional, unreasonable, or willful. The only questions raised are whether the treatment was proper. Nothing was submitted from which a reasonable juror could infer deliberate indifference; only negligence or medical malpractice could be inferred. Negligence or medical malpractice alone are not sufficient for a constitutional violation. See *Estelle, supra* at 106. When viewed in a light most favorable to plaintiff, there was nothing submitted by plaintiff in response to defendants' motion for summary disposition that supported that decedent was intentionally denied treatment or that treatment was unreasonably delayed. Plaintiff only claims that proper treatment was not administered. Thus, the trial court erred in denying the motion for summary disposition with regard to the 42 USC 1983 claims brought against Dr. Bedia and Nurse Cisco.

2. CMS

Plaintiff also brought the 42 USC 1983 claim against defendant CMS, and claims that CMS deprived decedent of his constitutional rights based on the actions and inactions of Dr. Bedia and Nurse Cisco. We find that the trial court erred in denying CMS' motion for summary disposition because Dr. Bedia and Nurse Cisco were not deliberately indifferent to decedent's serious medical needs.

With regard to CMS, this Court in *Dampier, supra* at 739, provided the following:

> To succeed in a 42 USC 1983 claim based on a theory of respondeat superior, plaintiffs must prove, in addition to proving deprivation of a constitutional

> property right, that the government's agents acted pursuant to official policy. [*Whaley v Saginaw Co*, 941 F Supp 1483, 1492 (ED Mich, 1996)]. Where the allegedly unlawful policy is not itself unconstitutional, the negligence behind the deprivation is only indirectly a 'moving force' behind the deprivation and cannot provide a basis for a 42 USC 1983 suit unless plaintiffs demonstrate deliberate indifference to their rights. *Id*. at 1494. "The concept of deliberate indifference implies that defendants knew or should have known that they were doing something 'wrong' or 'unconstitutional.'" *Id*.

In plaintiff's response to defendants' motion for summary disposition, plaintiff contends only that CMS deprived decedent of his constitutional rights based on the actions and inactions of Dr. Bedia and Cisco.[2] Plaintiff failed to raise a genuine issue of material fact with regard to whether decedent was deprived of his constitutional rights by Nurse Cisco or Dr. Bedia. Because the medical care administered by defendants Nurse Cisco and Dr. Bedia was not deliberately indifferent to decedent's serious medical needs, summary disposition is also proper with regard to plaintiff's 42 USC 1983 claim against CMS.

3. Macomb County

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[2] Plaintiff submitted the deposition of Nurse Kushniruk, who testified: (1) in her opinion CMS subjected inmates to a lesser standard of care; and (2) "a lot of things were not taken real seriously," noting (a) a time when she thought an inmate with one leg three times the size of the other should have been sent to the hospital and (b) in general medication was not always available and at times it was a practice to take it from another patient to give to somebody else. Plaintiff also provided a statement from Nurse Cisco, in which she indicates the official reason she was eventually fired was that she missed giving medication three times, but the real reason was personal differences. The documentary evidence submitted by plaintiff, when viewed in a light most favorable to plaintiff, does not raise a genuine issue of material fact regarding whether CMS was deliberately indifferent. Nurse Kushniruk's testimony was in terms of standard of care to be applied by doctors and nurses, which is medical malpractice terminology. Nurse Kushniruk testified regarding the individual with the enlarged leg, but did not testify that his medical condition worsened by not going to the hospital immediately. There is nothing supporting the assertion that the man with the enlarged leg needed to go to the hospital. Again, this only raises questions regarding the adequacy of the treatment administered. And, with regard to medication not being in stock, although some medication may not be in stock, both Nurse Kushniruk and Cisco testified Catapres was in stock and available. Further, the fact that CMS terminated Nurse Cisco for failing to give necessary medication does not support a policy tolerating failure to give quality medical care, but, instead, supports that there was a policy to terminate nurses who do not properly give patients their medication. Even when these submissions are viewed in the light most favorable to plaintiff, there is nothing supporting the claim that decedent was "intentionally denied or unreasonably delayed treatment," or that CMS "willfully failed to provide prescribed treatment." *Tobias, supra* at 277.

The trial court denied Macomb County's motion for summary disposition with regard to the 42 USC 1983 claim, finding that there was a question of fact based on there being a policy depriving decedent of his constitutional rights.[3] Macomb County argues that summary disposition was improperly denied with regard to plaintiff's 42 USC 1983 claim because there was no deliberate indifference to decedent's serious medical needs and, even if there was, there is no causal link between Macomb County's policy of contracting with CMS and decedent's death. We find that the trial court erred in denying Macomb County's motion for summary disposition because Dr. Bedia, Nurse Cisco, and CMS were not deliberately indifferent to decedent's serious medical needs.

A municipality can be held liable under § 1983 for its policies that violate the Constitution of the United States; however no respondeat superior liability is permitted. *Payton, supra* at 398. Thus, a municipality cannot be held liable under § 1983 solely because it employs a tortfeasor. *Id*. To sustain a cause of action against a municipality, a plaintiff must show that an "action pursuant to official municipal policy of some nature caused a constitutional tort." *Id.* The policy or custom must originate with the decisionmaker who has final policymaking authority with respect to the omission or commission at issue. *Sudul v City of Hamtramck*, 221 Mich App 455, 498; 562 NW2d 478 (1997) citing *Pembaur v Cincinnati*, 475 US 469, 482; 106 S Ct 1292; 89 L Ed 2d 452 (1986). A policy of inaction must reflect some degree of fault before it can be considered a policy for which § 1983 liability can be based. *Id.* at 499. The alleged policy or custom must be the "moving force" of the constitutional violation to establish liability against the government entity. *Id*. Thus, for Macomb County to be liable its policy of contracting with CMS has to be the moving force behind a constitutional violation.

Plaintiff must show that Macomb County's policy to contract with CMS was the moving force behind treatment to decedent that was deliberately indifferent to his serious medical needs. Because there is no showing that CMS, Dr. Bedia, or Nurse Cisco were deliberately indifferent to decedent's serious medical needs, plaintiff's 42 USC 1983 claims must fail because there is not a genuine issue of material fact as to whether a constitutional violation occurred; and even assuming a constitutional deprivation, plaintiff has not linked that constitutional violation to any policy or custom of Macomb County. Macomb County's motion for summary disposition should have been granted because plaintiff has not raised a question of fact with regard to whether CMS or its employees were deliberately indifferent to decedent's serious medical needs. For the above reasons, when viewed in a light most favorable to the plaintiff, summary disposition is proper with regard to the 42 USC 1983 claim against Macomb County because a reasonable juror could not infer deliberate indifference to decedent's serious medical needs by CMS, Dr. Bedia, or Nurse Cisco.[4]

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[3] The trial court found that a question of fact was raised by: (1) Nurse Kushniruk's testimony that CMS subjected inmates to a lesser standard of care; (2) Nurse Kushniruk's testimony regarding the treatment of a patient whose leg was enlarged; (3) testimony supporting that medication was not always in stock; and (4) Nurse Cisco's acknowledgement that she was terminated for failure to give medication.

[4] Additionally, plaintiff has presented nothing to support his claim that the alleged constitutional
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violation occurred because of the execution of Macomb County's policy to rely on CMS for its inmate's medical care. In a case decided by the United States Court of Appeals for the Sixth Circuit, a similar issue was discussed regarding what was needed to find a county liable for contracting with a private medical company to provide its inmates' medical care, and the court provided:

> A plaintiff asserting a section 1983 claim on the basis of a municipal custom or policy must "identify the policy, connect the policy to the [County] itself and show that the particular injury was incurred because of the execution of that policy." *Garner v Memphis Police Dep't*, 8 F3d 358, 364 (6th Cir), cert denied, 510 US 1177, 127 L Ed 2d 565, 114 S Ct 1219 (1994). Graham's claim is based upon the County's contract with SecureCare, which gives SecureCare responsibility over the provision of medical care to prisoners in the County jail. The County concedes that this contract constitutes a municipal "policy" within the meaning of *Monell*.
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> The primary issue is whether Graham has alleged sufficient facts to establish that the alleged constitutional violation happened "because of the execution of [the County's] policy." *Id*. (emphasis added). There must be "a direct causal link" between the policy and the alleged constitutional violation such that the County's "deliberate conduct" can be deemed the "moving force" behind the violation. *Waters v City of Morristown*, 242 F3d 353, 362 (6th Cir 2001) (citing *Bd of Cty Comm'rs v Brown*, 520 US 397, 404, 137 L Ed 2d 626, 117 S Ct 1382 (1997)) \ (quotation marks omitted); see also *Searcy v City of Dayton*, 38 F3d 282, 286 (6th Cir 1994). These stringent standards are "necessary to avoid de facto respondeat superior liability explicitly prohibited by *Monell*." *Doe*, 103 F3d at 508. [*Graham v County of Washtenaw*, 358 F3d 377, 383 (6th Cir 2004).]

In *Graham*, the plaintiff argued that the contract gave automatic deference to the independent agency and its medical staff and that it allowed nurses to make decisions beyond competence. *Id*. at 383. The *Graham* court recognized that it is not unconstitutional for a municipality to hire independent medical professionals to provide on-site health care to prisoners in their jails, and it is not unconstitutional for municipalities and their employees "to rely on medical judgments made by medical professionals responsible for prisoner care." *Id*. at 384, quoting *Ronayne v Ficano*, 1999 US App LEXIS 4579, No. 98-1135, 1998 WL 183479, at *3 (CA 6 March 15, 1999) (unpublished opinion). The court further added:

> [M]ost would find such a policy laudable in many respects. Not only does such a policy - like the one at issue in this case - allow prisoners to receive prompt health care from on-site doctors or nurses, it also ensures that an independent party, rather than a corrections officer, makes the critical decisions about whether and at what point a prisoner's medical needs are sufficiently severe that ambulatory care or hospitalization is warranted.

There was no allegation and supporting submission indicating that Macomb County's deliberate conduct could be the moving force behind a violation, and plaintiff's basic argument, as was the plaintiff's in *Graham*, is that Macomb County's policy did not address specific medical needs. And, this does not support plaintiff's claim that Macomb County was the moving force behind a constitutional violation. There is nothing supporting that Nurse Kushniruk reported any

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III

Next CMS, Dr. Bedia, and Cisco, contend that plaintiff failed to state a claim against defendants for deliberate indifference to a serious medical need pursuant to Michigan law upon which relief can be granted. For the reasons discussed, *supra*, there is no question of fact raised with regard to whether the treatment administered or not administered deprived decedent of his constitutional rights; i.e., defendants were not deliberately indifferent to decedent's serious medical needs. Thus, summary disposition is proper on any state claims premised on deliberate indifference.

IV

Defendants CMS, Dr. Bedia, and Nurse Cisco, also argue, on appeal, that the trial court erred in denying their motion for summary disposition with regard to plaintiff's ordinary negligence claims because the nature and origin of the claim concerns only professional medical care, and therefore, constitutes a claim for professional malpractice only.

A. Standard of Review

This Court utilizes the de novo standard in determining whether the nature of a claim is ordinary negligence or medical malpractice. *Bryant v Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 419; 684 NW2d 864 (2004).

B. Medical Malpractice vs. Negligence

Defendants CMS, Dr. Bedia, and Nurse Cisco argue that plaintiff's negligence claim must be dismissed because the allegations are the same as the medical malpractice claims. The trial court denied defendants' motion for summary disposition and allowed the claim to stand, indicating that it was not convinced that the claim was not viable. Plaintiff does not dispute that the negligence and malpractice claims are the same and based on the same transaction or occurrence. Thus, it must be determined whether the claims sound in malpractice or negligence.

In *Bryant, supra* at 422, our Supreme Court recently outlined the necessary considerations for determining whether an action sounds in ordinary or professional negligence:

> A medical malpractice claim is distinguished by two defining characteristics. First, medical malpractice can occur only "'within the course of a professional relationship.'" *Dorris* [*v Detroit Osteopathic Hosp Corp*, 460 Mich 26, 45; 594 NW2d 455 (1999)] (citation omitted). Second, claims of medical malpractice necessarily "raise questions involving medical judgment." *Id*. at 46. Claims of ordinary negligence, by contrast, "raise issues that are within the common

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concerns to Macomb County or a CMS supervisor. There is no direct casual link of deliberate conduct on the part of Macomb County that can be considered the moving force behind a violation of decedent's constitutional rights.

> knowledge and experience of the [fact-finder]." *Id*. Therefore, a court must ask two fundamental questions in determining whether a claim sounds in ordinary negligence or medical malpractice: (1) whether the claim pertains to an action that occurred within the course of a professional relationship; and (2) whether the claim raises questions of medical judgment beyond the realm of common knowledge and experience. If both these questions are answered in the affirmative, the action is subject to the procedural and substantive requirements that govern medical malpractice actions.

In understanding what constitutes "medical judgment," the *Bryant* Court said:

> Medical malpractice . . . has been defined as the failure of a member of the medical profession, employed to treat a case professionally, to fulfill the duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science. [*Bryant, supra* at 424, quoting *Adkins v Annapolis Hosp*, 116 Mich App 558; 323 NW2d 482 (1982).]

Plaintiff alleged gross negligence and, as the basis for the allegations, claimed defendants failed or neglected to: (1) appropriately follow a post surgical patient in a timely and proper manner; (2) obtain a complete medical history with regard to decedent's hypertension and recent craniotomy; (3) timely and appropriately monitor blood pressure of an individual with a long standing history of hypertension and recent blood clot; (4) timely notify the physician of the individual's recent history of craniotomy, hypertension, and current blood pressure reading; (5) timely order and administer antihypertensive medication for an individual with a history of hypertension and a recent craniotomy; (6) understand and recognize that the administration of Catapres should not be suddenly discontinued or interrupted for an individual with a history of hypertension and a recent craniotomy; (7) timely and appropriately recognize an increase in blood pressure and to timely contact the physician for appropriate intervention including, but not limited to the immediate administration of medication to reduce the individual's blood pressure; (8) order and administer the Catapres in an appropriate dosage and rate in an individual with a history of hypertension and after a recent craniotomy; (9) understand and recognize that an individual who has recently submitted to a craniotomy, who has hypertension, and whose Catapres has been discontinued is at risk for bleeding of the brain; and (10) appropriately and timely arrange for and transfer an individual with the decedent's history to a hospital for acute care when it became apparent that the individual's blood pressure was significantly elevated.

Analyzing plaintiff's claim, expert testimony is needed to assist the trier of fact in determining the reasonableness of each of the actions or inactions of CMS, Dr. Bedia, and Cisco alleged above. "If the reasonableness of the health professionals' action can be evaluated by lay jurors, on the basis of their common knowledge and experience, it is ordinary negligence." *Id*. at 423. Each of plaintiff's claims regard appropriate manners of treatment for a person who has a history of hypertension and who has had a craniotomy. Lay jurors do not know, without expert testimony, what appropriate treatment is for an individual who has a history of hypertension and who recently has had a craniotomy. Plaintiff acknowledges that the claims are the same and only pleads them as alternative. Because expert testimony would be needed to establish the standard of care required by a hospital and its employees, the claims brought by plaintiff are claims of

medical malpractice. *Bryant, supra* at 423-424. Thus, the trial court erred in denying defendants' motion for summary disposition with regard to the ordinary negligence claims.

V

Defendants CMS, Dr. Bedia, and Nurse Cisco next argue, on appeal, that plaintiff failed to state a claim for medical malpractice upon which relief may be granted because plaintiff's notice of intent does not comply with the requirements of MCL 600.2912b. We agree.

A. Preservation of the Issue

Plaintiff contends that, when defendants originally raised the issue in their brief on appeal, the argument was that the notice of intent did not comply with MCL 600.2912b(4)(c) and (d), and that defendants did not raise issue with MCL 600.2912b(4)(b) until defendants' supplemental authority was filed. Although defendants allocate most of the argument to § 2912b(4)(c) and (d), defendants also raise issue with the § 2912b(4)(b), contending in their brief on appeal that plaintiff generally states the applicable standard of care without noting specifically which defendant each standard applies to. Defendants have properly preserved and raised issue with plaintiff's notice of intent regarding MCL 600.2912b(4)(b), (c) and (d).

B. Standard of Review

The trial court's grant of summary disposition is reviewed de novo. *Roberts v Mecosta Co Hosp (After Remand)*, 470 Mich 679, 685; 684 NW2d 711 (2004).

C. Notice of Intent

Defendants CMS, Dr. Bedia, and Nurse Cisco argue that the trial court erred in finding that plaintiff's notice of intent complied with MCL 600.2912b. MCL 600.2912b(1) provides that before suit is brought against health professionals or health facilities, written notice of intent to file suit must be given not less than 182 days before the suit is filed. Once the plaintiff provides the written notice, the plaintiff is required to wait for the applicable notice period to pass before filing. *Roberts, supra* at 685. And, once the notice is given in compliance with MCL 600.2912b, the two-year period of limitations for medical malpractice actions is tolled during the notice period. MCL 600.5856(d). "Thus, in order to toll the limitation period under § 5856(d), the claimant is required to comply with all the requirements of § 2912b." *Roberts, supra* at 686. MCL 600.2912b(4) sets forth the following notice requirements:

> The notice given to a health professional or health facility under this section shall contain a statement of at least all of the following:
>
> (a) The factual basis for the claim.
>
> (b) The applicable standard of practice or care alleged by the claimant.
>
> (c) The manner in which it is claimed that the applicable standard of practice or care was breached by the health professional or health facility.

(d) The alleged action that should have been taken to achieve compliance with the alleged standard of practice or care.

(e) The manner in which it is alleged the breach of the standard of practice or care was the proximate cause of the injury claimed in the notice.

(f) The names of all health professionals and health facilities the claimant is notifying under this section in relation to the claim.

"[I]t is plaintiff's burden to establish compliance with § 2912b and, in turn, to establish entitlement to application of the notice tolling provision, § 5856(d)." *Roberts, supra* at 691. A plaintiff does not have to craft the notice "with omniscience." *Id*. "The statute requires only that the claimant set forth particular allegations and claims regarding the applicable standard of care, breach, etc. Accordingly, while the claimant must set forth allegations in good faith, in a manner that is responsive to the specific queries posed by the statute, and with enough detail to allow the potential defendants to understand the claimed basis of the impending malpractice action, the claimant is not required ultimately to prove that her statements are 'correct' in the legal sense." *Id*. at 691 n 7.

Defendants' challenge seems to be confined to § 2912b(4)(b), (c), and (d). Thus, we will address whether plaintiff's notice of intent satisfies § 2912b(4)(b), (c), and (d).

Section II of plaintiff's notice of intent titled "Applicable Standard of Care," provides:

Acceptable standards of practice and care dictate that Defendants and their agents and/or employees should:

-appropriately follow a post surgical patient in a timely and appropriate manner;

-appropriately obtain a complete medical history of an individual with a long standing history of hypertension and recent blood clot with craniotomy;

-timely and appropriately monitor the blood pressure of an individual with a history of hypertension and recent craniotomy;

-timely order and administer antihypertensive medication for an individual with a history of hypertension and recent craniotomy;

-understand and recognize that the administration of Catapres should not be discontinued or interrupted in an individual with a history of hypertension and recent craniotomy;

-timely and appropriately recognize increases in blood pressure and order appropriate intervention including but not limited to, the administration of medication to reduce the individual's blood pressure;

-Order and administer the Catapres in an appropriate dosage and rate in an individual with a history of hypertension and recent craniotomy;

> -Understand and recognize that an individual who has recently submitted to a craniotomy and who has a history of hypertension is at risk for bleeding in the brain if blood pressure is not appropriately controlled;
>
> -appropriately and timely transfer an individual with the above history to a hospital for acute care when it became apparent that the individual's blood pressure was significantly elevated[.]

The statute only requires that applicant set forth particular allegations and claims regarding the applicable standard of care with enough detail for defendants to understand the claimed basis of the impending action. *Roberts*, *supra* at 691 n 7.

We find that defendants' notice regarding the standard of applicable care does set forth the particular claims and the applicable standard of care. "However, what is required is that the claimant make a good-faith effort to aver the specific standard of care that she is claiming to be applicable to each particular professional or facility that is named in the notice." *Id*. at 691-692 (emphasis omitted). As such, the pertinent issue in the present case is whether plaintiff made a good faith effort to aver the applicable standard of care for "each" defendant. See *id*. With regard to standard of care our Supreme Court noted:

> The phrase "standard of practice or care" is a term of art in the malpractice context, and the unique standard applicable to a particular defendant is an element of a medical malpractice claim that must be alleged and proven. *Cox v Flint Bd of Hosp Mgrs*, 467 Mich 1, 10; 651 NW2d 356 (2002). The applicable standard is governed either by statute (see, for example, MCL 600.2912a[1], which sets forth the particular proofs that a malpractice plaintiff must present with respect to a defendant's "standard of practice or care," depending on whether the defendant is a general practitioner or a specialist) or, in the absence of a statutory standard, by the common law. *Cox*, *supra* at 5, 20. The standard of practice or care that is applicable, for example, to a surgeon would likely differ in a given set of circumstances from the standard applicable to an OB/GYN or to a nurse. [*Id*. at 692 n 8.]

Accordingly, the standard of care would be different for a doctor, a nurse, and a healthcare organization.

In the present case, like in *Roberts*, plaintiff provides the standard of care without specifically providing who the standard is applicable to. Plaintiff did not specify who the standard of care was applicable to; i.e., whether the alleged standards were applicable to Dr. Bedia, Nurse Cisco, or CMS. With regard to CMS, like in *Roberts*, plaintiff in this case, does not allege a standard applicable specifically to a hospital or professional corporation as opposed to any other healthcare professional or facility and does not provide whether CMS was directly or vicariously liable. See *id*. at 693. Plaintiff simply includes a list of names of defendants including CMS and does not specify what standard or theory is applicable. Thus, "plaintiff's notices neither alleged a standard specifically applicable to the defendant facilities, nor did they serve as adequate notice to these defendants that plaintiff planned to proceed under a vicarious liability theory at trial." *Id*.

With regard to the individual defendants Dr. Bedia and Nurse Cisco, plaintiff's notice of intent clearly contains specific averments. However, the problem again is that plaintiff has not specified what averments are with regard to Dr. Bedia and/or Nurse Cisco. And, "the standard applicable to one defendant is not necessarily the same standard applicable to another defendant." *Id*. at 694 n 4. Thus, plaintiff's notice of intent fails to comply with § 2912b(4)(b) with regard to all defendants.[5]

The same problem exists with regard to plaintiff's section stating the manner in which the applicable standard of care was breached, § 2912b(4)(c),[6] and the action that should have been taken section, §2912b(4)(d)[7]; i.e., the sections do not specify which standards are being breached by who and what actions specific individuals or the entity should have taken. Plaintiff's notice of intent does not provide the level of specificity required by *Roberts*.

Plaintiff did not specify what standards of care were applicable to what defendant, did not specify how each defendant breached the standard of care, and did not specify who should have taken what actions. As such, plaintiff did not fulfill the § 2912b obligation, and the statute of limitations was not tolled during the notice period, thus, defendants' motion for summary disposition should have been granted because the two year medical malpractice statute of limitations had run by the time the complaint was filed. Comparing the statutory requirements of the notice of intent, as interpreted in *Roberts*, with the notice provided to defendants, the notice did not set forth the minimal requirements as required by *Roberts*, thus, the trial court erred in denying defendants' motion for summary disposition in this regard.

VI

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[5] We note that the specificity required by *Roberts* could have the potential of causing claims with merit to be dismissed based on minor procedural technicalities, such as an attorney's failure to specify which standard of care applies specifically to each defendant. "'The purpose of the notice requirement is to promote settlement without the need for formal litigation and reduce the cost of medical malpractice litigation while still providing compensation for meritorious medical malpractice claims that might otherwise be precluded from recovery because of litigation costs.'" *Gulley-Reaves v Baciewicz*, 260 Mich App 478, 488; 679 NW2d 98 (2004) quoting *Neal v Oakwood Hosp Corp*, 226 Mich App 701, 705; 575 NW2d 68 (1997). The standards of care presented by plaintiff seemingly would be enough to provide defendants Dr. Bedia, Nurse Cisco, and CMS with enough detail for them to understand the basis of the impending claims for settlement discussion purposes. But under *Roberts*, the notice of intent is insufficient because it does not specify which standards of care are applicable to whom.

[6] Plaintiff's section for the manner in which the standard of care was breached provides: "The applicable standard of practice and care was breached as evidenced by the failure to do those things set forth in section II above."

[7] Plaintiff's section for the action that should have been taken in compliance with the applicable standard of care provides: "The action that should have been taken to achieve compliance with the standard of care should have been those things set forth in section II above."

The city of Warren and Officer Galasso argue on appeal that the trial court erred in denying their motion for summary disposition based on governmental immunity with regard to plaintiff's state claims.

A. Standard of Review

A trial court's ruling on a motion for summary disposition is reviewed de novo. *Roberts, supra* 685. The applicability of governmental immunity is also a question of law reviewed de novo. *Baker v Waste Management of Michigan, Inc*, 208 Mich App 602, 605; 528 NW2d 835 (1995). Under MCR 2.116(C)(8), the legal basis of the complaint is tested by the pleadings alone. *Maiden, supra* at 119. All factual allegations are taken as true and any reasonable inferences or conclusions that can be drawn from the facts are construed in the light most favorable to the nonmoving party. *Id*. The motion should be denied unless the claim is so clearly unenforceable as a matter of law that no factual development can possibly justify a right to recover. *Id*. A motion for summary disposition under MCR 2.116(C)(7) should be granted when the claim is barred because of immunity granted by law. The Governmental Tort Liability Act, MCL 691.1401 *et seq*., "provides broad immunity from tort liability to governmental agencies whenever they are engaged in the exercise or discharge of a governmental function[.]" *Ross v Consumers Power Co* (*On Rehearing*), 420 Mich 567, 595; 363 NW2d 641 (1984); see MCL 691.1407(1). To survive a MCR 2.116 (C)(7) motion raised on these grounds, the plaintiff must allege facts warranting the application of an exception to governmental immunity. *Smith v Kowalski*, 223 Mich App 610, 616; 567 NW2d 463 (1997). Neither party is required to file supportive material; any documentation that is provided, however, must be admissible evidence. *Maiden, supra* at 119. Therefore, when considering a motion brought under both MCR 2.116(C)(8) and (C)(7), it is proper for the court to review all the material submitted in support of, and in opposition to, the plaintiff's claim. *Patterson v Kleiman*, 447 Mich 429, 431-435; 526 NW2d 879 (1994). The plaintiff's well pleaded factual allegations, affidavits, or other admissible documentary evidence must be accepted as true and construed in the plaintiff's favor, unless contradicted by documentation submitted by the movant. MCR 2.116(G)(5); *Maiden, supra* at 119; *Smith, supra* at 616.

B. State Tort Claims Against the City of Warren

Defendants contend that the state tort claims and state constitutional claims against Warren should have been dismissed because of governmental immunity. A review of the first amended complaint reveals that there were no state tort claims brought against Warren, and plaintiff acknowledges this. But there are state constitution claims brought against Warren. Because no damage remedy exists for a violation of the Michigan Constitution in an action against a municipality or an individual government employee, summary disposition of plaintiff's state constitutional claims was proper pursuant to MCR 2.116(C)(8). See *Jones v Powell*, 462 Mich 329, 335; 612 NW2d 423 (2000). Thus, summary disposition was proper on all of the state claims against the city of Warren.

C. Officer Lou Galasso

Defendants contend that the trial court erred in denying defendant Officer Galasso's motion for summary disposition from the gross negligence claim because he is immune. MCL 691.1407(2) provides:

> Except as otherwise provided in this section, and without regard to the discretionary or ministerial nature of the conduct in question, each officer and employee of a governmental agency . . . is immune from tort liability for an injury to a person or damage to property caused by the officer, employee, or member while in the course of employment or service . . . if all of the following are met:
>
> (a) The officer, employee, member, or volunteer is acting or reasonably believes he or she is acting within the scope of his or her authority.
>
> * * *
>
> (c) The officer's, employee's, member's, or volunteer's conduct does not amount to gross negligence that is the proximate cause of the injury or damage. As used in this subdivision, "gross negligence" means conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.

There is no dispute that Officer Galasso was acting within the course of his employment during his contact with decedent, thus, the remaining questions to address are whether his conduct amounted to gross negligence and, if so, was Galasso's conduct the proximate cause of decedent's death.

If reasonable jurors could honestly reach different conclusions regarding whether conduct constitutes gross negligence, the issue is a factual question for the jury and summary disposition is precluded. *Stanton v City of Battle Creek*, 237 Mich App 366, 375; 603 NW2d 285 (1999), affirmed 466 Mich 611 (2002). However, if reasonable minds could not differ, the issue may be determined by summary disposition. *Id.* "Gross negligence" is defined under the immunity statute as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results." MCL 691.1407(2). To be the proximate cause of an injury, gross negligence of a government employee that subjects him to liability must be "the one most immediate, efficient and direct cause" preceding the injury. *Robinson v Detroit*, 462 Mich 439, 462; 613 NW2d 307 (2000) see also *Tarlea v Crabtree*, 263 Mich App 80, 92; 687 NW2d 333 (2004) (finding that the defendants' conduct was not the proximate cause of the plaintiff's death due in part to heat stroke where the plaintiff had the option to not participate in a football-camp run or to stop and rest during the run). Evidence of ordinary negligence does not create a question of fact regarding gross negligence. *Maiden, supra* at 122-123.

The trial court, in finding gross negligence, did not look at the actions of Officer Galasso alone, and it did not specifically address the issue of gross negligence in terms of Galasso; instead seemed to find gross negligence based on the a policy of the city of Warren. Officer Galasso was not the arresting officer responsible for booking decedent and obtaining information for the prisoner receiving information form, and he was not the detention officer responsible for decedent during his period of confinement in the Warren jail before his transfer to the Macomb County Jail. Officer Galasso was the investigating officer, and spoke with decedent after he had been arrested and booked. Officer Galasso, in his deposition, indicated that decedent did not discuss medication with him or mention it and that he had no further contact with decedent after he was turned over to the detention officers. Decedent's sister Kimberley Chiamp testified, at her deposition, that decedent had told her that he had told some officers about his need for

Catapres. And, decedent's other sister Dawn Hartzell testified in her deposition that she had talked to Officer Galasso and that she advised him of decedent's surgery and high blood pressure. In plaintiff's answers to interrogatories there is an indication that Dawn Hartzell informed Officer Galasso that decedent needed his medication. When viewed in the light most favorable to plaintiff, there is evidence that Officer Galasso was aware of decedent's recent surgery and his need to take Catapres. But Officer Galasso's knowledge of this alone is not enough to support a claim of gross negligence. The evidence at best supports ordinary negligence, and evidence of ordinary negligence does not create a question of fact regarding gross negligence. See *Maiden, supra* at 122-123. There is nothing supporting that Officer Galasso was so reckless as to demonstrate a substantial lack of concern for injury to decedent. Even when viewed in the light most favorable to plaintiff, there is no evidence to support gross negligence on the part of Officer Galasso; as reasonable minds could not differ on this issue.

Assuming for the purposes of this opinion that the conduct of Officer Galasso did constitute gross negligence, that is but one of the contributing causes that combined to be causative in bringing about decedent's death. In *Robinson, supra* at 462, our Supreme Court provided:

> [R]ecognizing that "the" is a definite article, and "cause" is a singular noun, it is clear that the phrase "the proximate cause" contemplates *one* cause. Yet, meaning must also be given to the adjective "proximate" when juxtaposed between "the" and "cause" as it is here. We are helped by the fact that this Court long ago defined "the proximate cause" as "the immediate efficient, direct cause preceding the injury." *Stoll v Laubengayer*, 174 Mich 701, 706; 140 NW 532 (1913). The Legislature has nowhere abrogated this, and thus we conclude that in MCL 691.1407(2)(c); MSA 3.996(107)(2)(c) the Legislature provided tort immunity for employees of governmental agencies unless the employee's conduct amounts to gross negligence that is the one most immediate, efficient, and direct cause of the injury or damage, i.e., the proximate cause.

Plaintiff argues that decedent's hypertension and failure to receive Catapres was the proximate cause of decedent's death, thus, Officer Galasso as a person who failed to make sure he received this medication was the proximate cause. Plaintiff's claims against Officer Galasso stem from his contact with decedent on July 25, 1998, before he was placed in the cell, and then again on July 27, 1998 when he was arraigned after which decedent was transferred to Macomb County Jail. Upon arrival at Macomb County Jail, decedent was examined by both Nurse Cisco and Dr. Bedia prior to when he was found unconscious in his cell on July 28, 1998. Clearly, the one most immediate, efficient, and direct cause of decedent's death was not his contact with Officer Galasso and Officer Galasso's failure to take action. Plaintiff's affidavits of merit further support that Officer Galasso was not the proximate cause of decedent's injuries as both Dr. Neil Farber and Nurse Gail Serrian indicate that the breach of the standard of care by Dr. Bedia and Nurse Cisco was the proximate cause of decedent's death. Officer Galasso's conduct, again assuming gross negligence**,** while a cause of decedent's death, it was but one cause, and was therefore, not "the one most immediate, efficient, and direct cause" as required by *Robinson*. *Id*.

For the above reasons, defendants' motion for summary disposition should have been granted with regard to the claim for negligence against Officer Galasso.

VII

In conclusion, we find that: (1) summary disposition is proper on plaintiff's 42 USC 1983 claim against Macomb County, CMS, Dr. Bedia, and Nurse Cisco because there is no question of fact raised with regard to whether the treatment administered or not administered deprived decedent of his constitutional rights, i.e., defendants were not deliberately indifferent to decedent's serious medical needs;[8] (2) expert testimony would be needed to establish the standard of care required by a private health care corporation and its employees for the ordinary negligence claims against CMS, Dr. Bedia, and Nurse Cisco, thus, the claims are medical malpractice claims, and summary disposition should have been granted with regard to these claims; (3) plaintiff's notice of intent did not set forth the minimal requirements, thus, the trial court erred in denying defendants' motion for summary disposition with regard to the medical malpractice claims; and (4) summary disposition was improperly denied with regard to all state claims brought against the city of Warren and Officer Galasso because no damage remedy exists for a violation of the Michigan Constitution in an action against a municipality or an individual government employee and because Officer Galasso was not grossly negligent and was not *the* proximate cause of decedent's death.

We reverse and remand for entry of summary disposition in favor of defendants Macomb County, CMS, Dr. Bedia, and Nurse Cisco on all claims, for entry of summary disposition in favor of Warren and Officer Galasso with regard to all state claims, and for further proceedings with regard to the 42 USC 1983 claims against Warren and Officer Galasso. We do not retain jurisdiction.

/s/ Michael J. Talbot
/s/ Kathleen Jansen
/s/ Hilda R. Gage

[8] Warren and Officer Galasso did not raise any issues regarding plaintiff's federal 42 USC 1983 claim, thus, the 42 USC 1983 claim remains viable with regard to Warren and Officer Galasso.